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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of DON PHUOC TRAN
and NEWOANH NGUYEN.

DON PHUOC TRAN,

Appellant,

v.

NEWOANH NGUYEN,

Respondent.

G050719

(Super. Ct. No. 01D008413)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Daphne Sykes Scott, Judge. Reversed.

Julie A. Duncan for Appellant.

The Miller Family Law Group, Ewelina A. Miller, Matthew H. Miller;
Prenovost, Normandin, Bergh & Dawe, Thomas J. Prenovost, Jr., and Kristin F. Godeke
for Respondent.

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INTRODUCTION

More than 10 years after entry of judgment based on a marital settlement agreement entered between Don Phuoc Tran and Newoanh Nguyen, Nguyen filed a motion seeking an order to divide a California Public Employees' Retirement System (CalPERS) pension account, which she contends Tran failed to disclose during their dissolution proceedings. The trial court granted the motion and ordered that Tran's pension account be divided pursuant to a qualified domestic relations order (QDRO), and awarded Nguyen sanctions against Tran.

We reverse. The record shows that at the outset of the marital dissolution proceedings, Tran timely disclosed the existence of his only retirement account and accurately reported (in accordance with the statement he had received from CalPERS) that at the time, it had a present value of \$49,000. Pursuant to the marital settlement agreement, upon which the judgment of dissolution was based, Tran and Nguyen agreed to cash out Nguyen's interest in that account. It is undisputed Tran fully paid the agreed-upon, cash-out amount. Consequently, the record does not support the trial court's finding that Tran willfully failed to disclose his CalPERS pension account.

Accordingly, the record shows that Tran timely and fully disclosed his only retirement account to Nguyen and Nguyen received one-half of its present value at that time. There is no legal basis for Nguyen to also receive one-half of the current value of that account now.

BACKGROUND

Tran and Nguyen were married in August 1985 and, after 16 years of marriage, separated in August 2001. At the time they separated, Tran and Nguyen's three children were minors (ages 6, 15, and 16).

I.

TRAN INITIATES MARITAL DISSOLUTION PROCEEDINGS; AT THE OUTSET,
TRAN DISCLOSES, INTER ALIA, \$49,000 IN A RETIREMENT ACCOUNT
THROUGH HIS EMPLOYMENT.

On September 6, 2001, Tran, acting in propria persona, filed a petition for the dissolution of his marriage to Nguyen, a schedule of assets and debts, and an income and expense declaration. In the petition for dissolution, Tran requested joint legal custody of the children; he further requested that physical custody be awarded to Nguyen, and visitation be granted to him. Tran also requested that the trial court confirm the following assets be deemed Tran's or Nguyen's separate property as follows:

<u>"Item</u>	<u>Confirm to</u>
"91 LX Honda Accord, it was paid off	Petitioner [(Tran)]
"2000 EX Honda Accord, was paid off	Respondent [(Nguyen)]
"89 Toyota Camry, was paid off	Respondent
"\$49,000 husband's retirement account at place of employment	Petitioner
"If other unfound assets be discovered, the petition'll be amended accordingly."	

Tran's petition listed the "community and quasi-community assets and debts as currently known," as follows: "Family home located at 16322 Lunar St, Westminster CA 92683, it is paid off with balance of \$0, estimate current market value: \$270,000, both parties agree to divide in 1/2 of net proceed. Petitioner and respondent agree to sell the property when 2nd child H[.] reaches the age of 18 yrs old ([2004]). 940 shares of Janus Global Tech stock to be divided in 1/2 or 470shs each at and can be sold by either party any time with written notice."

In his "Schedule of Assets and Debts," Tran disclosed (1) real property on Lunar Street in Westminster, for which the mortgage had been paid off; (2) furniture,

electronic equipment, and appliances; (3) three cars (each of which were paid for in full); (4) life insurance through Tran's employment; (5) "940 Janus Global Tech stock invested in [Tran's] name at his employment, currently estimate market value about \$14,000" with a note that "[b]oth parties agree to divide in 1/2 or 470 shs each to be sold separately at any time with written notice"; and (6) "401K at place of employment, invested in [Tran's] name" with a note that Nguyen "agrees to let [Tran] keep it as his own separate money. (It is invested in stocks, estimate current mrkt value approx \$49,000)." Tran reported "[t]otal [a]ssets" valuing \$364,025, and further stated neither he nor Nguyen had any debts.

In his income and expense declaration, Tran stated he was an engineer employed by the City of Long Beach, earning a \$4,038 net monthly disposable income. He further stated Nguyen was a "[s]elf employed independent manicurist," earning \$1,176 gross per month.

II.

NGUYEN'S RESPONSE

On October 9, 2001, Nguyen, represented by Attorney Bruce C. Bridgman, filed a response to Tran's petition, in which she also requested dissolution of the marriage.¹ As to requesting confirmation of separate property assets and debts and the disclosure of quasi-community assets and debts, Nguyen stated she was "unaware of the true nature and extent" of such matters and would "seek to amend" once she received such information. She agreed with Tran's requests regarding custody and visitation. She also requested spousal support.

On November 6, 2001, Nguyen's attorney, Bridgman, substituted out as counsel in the action; Nguyen thereafter represented herself in propria persona.

¹ Nguyen's response included "[s]tatistical [f]acts" regarding the marriage that were wrong, stating she and Tran married in August 1995 and had only been married six years before they separated in August 2001.

On June 4, 2002, an attorney, Anh Duy Nguyen, purporting to represent Nguyen,² filed a form entitled “Appearance, Stipulations, and Waivers,” which stated, inter alia, that Tran and Nguyen had stipulated to have their cause “tried as an uncontested matter”; they waived the rights to notice of trial, findings of fact and conclusions of law, motion for a new trial, and the right to appeal; and they had entered into a written settlement agreement.

On July 24, 2002, Anh Duy Nguyen filed a stipulation signed by Tran and Nguyen, in which they stipulated to mutually waive the statutory requirements regarding the service of final declarations of disclosure on each other. On that same day, Tran filed a declaration stating he had served his preliminary declaration of disclosure and income and expense declaration on Nguyen (by mail) on January 15, 2002. A copy of that preliminary declaration of disclosure is not in our record pursuant to Family Code section 2104, subdivision (b).³ (All further statutory references are to the Family Code unless otherwise specified.)

III.

IN 2002, JUDGMENT OF DISSOLUTION IS ENTERED IN ACCORDANCE WITH TRAN AND NGUYEN’S MARITAL SETTLEMENT AGREEMENT.

On July 26, 2002, following an uncontested proceeding by declaration under section 2336, judgment of the dissolution of Tran and Nguyen’s marriage was entered. The judgment stated, “[a] marital settlement agreement between the parties is

² On June 7, 2002, a substitution of attorney form was filed, stating that Nguyen was at that point represented by Attorney Anh Duy Nguyen. That form contains the signatures of Nguyen and Anh Duy Nguyen, dated November 9, 2001, and a proof of service stating it was served by mail on Tran on March 12, 2002.

³ Our record does not show the trial court ever reviewed either Tran’s or Nguyen’s preliminary declaration before ruling on Nguyen’s motion for an order dividing the pension account. (See *Lappe v. Superior Court* (2014) 232 Cal.App.4th 774, 781 [“Upon a motion to set aside the judgment, the court may order the parties to provide the court with the preliminary and final declarations of disclosure that were exchanged between them. (Fam. Code, § 2107, subd. (e).)”].)

attached” and further stated that “[a]ll terms, conditions and provisions of the attached Marital Settlement Agreement are merged and incorporated into the judgment.” The marital settlement agreement, filed with the trial court, was prepared by Nguyen’s counsel, Anh Duy Nguyen, and was signed by Tran on January 3, 2002, by Nguyen on February 27, 2002, and by Anh Duy Nguyen on March 5, 2002.

As pertinent to the issues in this appeal, the marital settlement agreement addressed the division of the family residence as follows: Tran and Nguyen agreed that the family residence would be sold when their second child reached 18 years of age in 2004. The agreement stated that at that time, “[t]he net sale proceeds shall be divided equally between [Tran] and [Nguyen]; except that [Nguyen] shall receive an addition[al] \$25,000 from [Tran]’s share of the sale proceeds in exchange for [Nguyen]’s giving up her interest in [Tran]’s retirement plan.” It further stated that pending the sale of the residence, Nguyen would have exclusive control and possession of the family residence, for which she would be responsible to pay property taxes and insurance; the mortgage had been paid off.

The marital settlement agreement also contained a section, entitled “Employee and Retirement Benefit,” which stated: “1. *A portion of the benefits arising under the retirement plan including the deferred compensation plan through [Tran]’s employment with City of Long Beach* is community property. [Nguyen] hereby transfers, assigns, and conveys any and all interests that she may have in such benefits and said deferred compensation plan to [Tran] as his sole and separate property and releases all claims she may now have or may assert in the future against said benefits and plan. [¶] 2. In exchange for [Nguyen]’s releasing her interest in [Tran]’s employee and retirement benefit, [Tran] shall pay [Nguyen] the sum [of] \$30,000.00 payable as follows: \$5,000.00 on or before December 31st, 2001, and the remaining balance of \$25,000.00 upon the sale of the family residence to be deducted from [Tran]’s share of the sale

proceeds. The Court shall retain continuing jurisdiction over this issue until said sum is paid.” (Italics added.)

The marital settlement agreement also provided that Tran would pay Nguyen \$600 per month per child in child support.

IV.

IN 2013, NGUYEN RETAINS NEW COUNSEL, AND, IN 2014, SHE FILES A MOTION FOR AN ORDER DIVIDING TRAN’S CALPERS PENSION ACCOUNT ON THE GROUND HE HAD FAILED TO DISCLOSE IT DURING THEIR DISSOLUTION PROCEEDINGS; TRAN RETAINS COUNSEL AND OPPOSES THE MOTION ON THE GROUND HE HAD DISCLOSED THAT ACCOUNT AND FULLY PAID NGUYEN FOR HER COMMUNITY SHARE IN IT.

In October 2013, a substitution of attorney form was filed, stating that The Miller Family Law Group, and specifically Ewelina A. Miller and Matthew H. Miller, had been retained by Nguyen. On April 2, 2014, Nguyen filed a motion for an order awarding Nguyen “100% of the community property interest” in Tran’s CalPERS pension account on the ground he failed to disclose that asset during their dissolution proceedings; she also sought sanctions, attorney fees, and costs against Tran. She stated in her motion that the court should consider, in deciding whether to grant her request for attorney fees and costs, “[t]here is a significant discrepancy in my income and [Tran]’s income. I earn approximately \$1,000 per month while [Tran] earns approximately \$11,000 per month.”

Nguyen’s April 2014 motion was supported by her declaration, in which she stated that in September 2013, she had communicated with a friend (who is also Tran’s sister-in-law) who had knowledge of “disputed issues” in Tran’s second dissolution of marriage case. Nguyen stated she had then learned that Tran was in a dispute with his “now second (2nd) ex-wife as to the division of a *pension* account with the City of Long Beach.” Nguyen further stated she had told the friend that Tran did not have a pension account, but instead “the only retirement benefits that he had, according to the information [she] was provided during [their] dissolution, was a *401(k)* plan.” The

friend told Nguyen she was wrong and suggested she communicate with a family law attorney to determine whether there had been undisclosed assets during her dissolution case with Tran.

In her declaration, Nguyen stated that through her investigation, she had learned Tran never had any interest in a 401(k) plan during the marriage and he “did not even start investing in any form of deferred compensation through the city of Long Beach until approximately five (5) months after [their] marriage was dissolved.” Nguyen further stated: “I believe [Tran] intentionally misrepresented his pension benefits, i.e. benefits which provide for consistent monthly payments that escalate in value over time as the length of his employment and his earnings increase, as a 401(k), a set and lowered valued amount, as a means of reducing his ‘buy-out’ of my interest in this account. This intentional misrepresentation significantly affected the means in which my interest in [Tran]’s retirement would be valued. To further demonstrate the full extent to which my interests in this community asset were intentionally damaged by [Tran]’s non-disclosure and/or intentional misrepresentation, I have retained the services of Millerd Actuarial Services to value my interest in said pension account. Pursuant to said actuarial, which is marked and attached hereto as **Exhibit ‘A’**, the community interest in this undisclosed and/or intentionally misrepresented account is **\$623,250**. [¶] . . . **As [Tran] claimed the value of this account was \$49,000, my one-half interest in the community estate was damaged and/or impaired, as a result of this misrepresentation, by the total sum of \$287,125.**”

On May 12, 2014, Attorney William T. Hoy was substituted in as counsel for Tran. Hoy filed a responsive declaration in opposition to Nguyen’s motion for an order, explaining that his CalPERS and deferred compensation plans had been divided, and that an equalization payment relating to them had been paid in full to Nguyen.

In support of his opposition to Nguyen’s motion, Tran filed a declaration stating, in part, that on August 22, 2001, he and Nguyen jointly hired Paralegal Self-Help

Services “to help with a self-help divorce.” Tran stated that when he filed for divorce, Paralegal Self-Help Services prepared the documents he filed. He also stated that he provided Paralegal Self-Help Services with the “Janus statement and Cal-PERS statement . . . who used these statements to prepare the SCHEDULE OF ASSETS AND DEBTS.” Tran further stated: “Note page 3 of my SCHEDULE OF ASSETS AND DEBTS lists the 940 Janus Global Tech (which is my deferred compensation plan) with a value of about \$14,000.00 (which was the value at that time per the Janus Statement) and lists the 401K Plan (which is my Cal-PERS) with an approximate value of \$49,000.00 (which was the value according to the Annual Member Statement as stated at the top of page 2 which says, ‘Your contribution and accrued interest shown above are not available to you unless you elect a refund after your permanent separation from all employment covered by CalPERS . . .’). These were and have always been my only two retirement plans through my employment. I relied on these statements (as did [Nguyen]) in determining the values of these retirement plans. Both retirement plans were disclosed from the beginning and [Nguyen] and I both used values based upon the statements. **I gave my only copy of my 2001 Cal-PERS statement to Self-Help so I don’t have another copy.** I do have a copy of the 2000 Cal-PERS Statement (attached as Exhibit ‘B’) with a stated value of \$43,824.00 . . . and I do have a copy of the 2002 Cal-PERS statement (attached as Exhibit ‘C’) with a stated value of \$58,745.00 so the value of \$49,000.00 would be in the ballpark for my 2001 Cal-PERS value as stated in my SCHEDULE OF ASSETS AND DEBTS. I need to emphasize that both I and [Nguyen] truly and honestly believed the value on the Cal-PERS Plan Statement was the actual amount stated on the Annual Plan Statement.” Tran attached copies of the referenced CalPERS statements to his declaration.

Tran also stated, in his declaration, that his preliminary declaration of disclosure “was drafted for [him] by [Nguyen]’s attorney Anh Duy Nguyen who drafted all the pleadings necessary to file the stipulated JUDGMENT.” Tran further stated that

on March 25, 2002, he and Nguyen “signed a handwritten final agreement (attached as Exhibit ‘H’). This agreement was witnessed by Alan Dang (who[se] DECLARATION is filed with this pleading). This agreement specifically divides the deferred compensation plan and specifically states regarding the division of PERS, ‘Split the husband’s Public Retirement System account (PERS). The current balance is \$50,000.00. Husband will pay wife Newoanh Nguyen the half in two years . . .[.]’ Note this Agreement specifically mentions the PERS and is signed by [Nguyen], witnessed and signed by Alan Dang, and dated March 25, 2002. This Agreement without a doubt discloses the PERS and the method of compensation.”

Exhibit H, attached to Tran’s declaration, is a handwritten agreement dated March 25, 2002, and purportedly signed by Tran, Nguyen, and Dang (designated as “Friend of the Family”). That handwritten agreement stated, in part, that Tran and Nguyen agreed to “[s]plit the husband’s Public Retirement System account (PERS). The current balance is [\$]50,000. Husband will pay wife Newoanh Nguyen the half in two years.”

In his declaration in support of the opposition to the motion, Dang stated he was a family friend of Tran and Nguyen and, on March 25, 2002, he attended a meeting at their residence during which Tran and Nguyen discussed the division of their community property including real property and “Mr. Tran’s Deferred Compensation and Public Employee Retirement System (PERS) pension from the City of Long Beach.” Dang stated they discussed that Tran and Nguyen “shall divide the deferred compensation plan of 940 Janus Global Technology Fund shares, each shall have 470 shares.” Dang also stated:

“Regarding Mr. Tran’s PERS, the agreed current balance (at that time) was approximately \$50,000.00. It was clearly discussed that there were three (3) options that Ms. Nguyen could choose from:

“1) Contact Cal-PERS for the withdrawal of half of the balance, based on a divorce date of August 6, 2001.

“2) Division of the community interest in Mr. Tran’s benefit, at that time benefits become payable to member at his retirement.

“3) A buy-out of Mr. Tran’s PERS for half of the current balance of \$50,000.00. Mr. Tran would agree to pay M[s]. Nguyen a total sum of \$25,000.00 in two years.”

Dang stated: “Regarding these options, Ms. Nguyen considered all of the three (3) options and accepted/agreed with the third option. Subsequently, the parties present signed a handwritten agreement confirming the agreed upon terms. This agreement was signed by me and a true copy is attached as Exhibit ‘H’ to [Tran]’s Declaration.”

Our record does not show Nguyen objected to the evidence presented by Tran in his opposition or responded to it in the trial court. (Nguyen does not address this evidence at all in her respondent’s brief on appeal.)

V.

**THE TRIAL COURT GRANTS NGUYEN’S MOTION FOR AN ORDER DIVIDING
TRAN’S CALPERS PENSION ACCOUNT AND AWARDS NGUYEN SANCTIONS
AGAINST TRAN IN THE AMOUNT OF \$5,000.**

Our record does not show that an evidentiary hearing was held before the trial court’s decision on this matter. Based on the parties’ written submissions, the court granted Nguyen’s motion, stating in a minute order: “Court finds that [Tran] breached his fiduciary duty to fully and accurately disclose information relative to his CalPERS pension account and that [Nguyen] relied upon such incomplete disclosure at judgment. [¶] The Court orders this asset to be divided pursuant to a Qualified Domestic Relations Order (QDRO). The cost of the QDRO shall be born equally by the parties. [Nguyen]’s final share of the pension, as calculated by the QDRO, shall be reduced by the

\$30,000.00 that was paid as her proportionate share of this asset in the Judgment. [¶] [Nguyen]’s Motion for attorney fees under Family Code §2030 is denied without prejudice. [¶] [Nguyen]’s Motion for sanctions pursuant to Family Code §271 is granted in the amount of \$5,000.00. [¶] [Tran]’s request for attorney fees is denied. [¶] The Judgment shall remain in all other respects.”

Tran, in propria persona, filed a motion to reconsider the court’s ruling, or set aside or vacate its order, on the ground he had timely and accurately disclosed his retirement benefit plan. On September 12, 2014, the trial court heard argument from both parties and denied Tran’s motion to vacate. Tran appealed.

DISCUSSION

Tran argues the trial court erred by finding he had failed to disclose his CalPERS pension account to Nguyen during the dissolution proceedings. We agree.

The record establishes Tran not only timely disclosed the existence of that retirement account, he accurately reported its present value as set forth on the 2001 CalPERS account statement that he had received from CalPERS. The record further shows that in 2002, Nguyen agreed to be cashed out of her community property interest in that account pursuant to the terms of the parties’ marital settlement agreement and was indisputably fully paid the agreed-upon, cash-out amount. Consequently, there is no legal basis for the trial court’s order requiring the pension be divided pursuant to a QDRO, or for the trial court’s award of sanctions against Tran.

I.

A SPOUSE’S DUTY TO DISCLOSE ASSETS UNDER SECTIONS 721, 1101, AND 2100 ET SEQ.

In *In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1269, a panel of this court summarized Family Code provisions “detailing the fiduciary obligations between spouses,” including sections 721, 1101, and 2100 et seq.,

all of which Nguyen relied upon in her motion. The court in *In re Marriage of Prentis-Margulis & Margulis*, *supra*, 198 Cal.App.4th at page 1269, stated:

“Section 721, subdivision (b)’s specific incorporation of ‘the same rights and duties of nonmarital business partners, as provided in’ section 16403 of the Corporations Code, makes clear that the duty to disclose relevant information concerning transactions affecting the community property is an affirmative and broad obligation.”

A final declaration of disclosure of assets under the Family Code must contain, *inter alia*, “accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity that presents itself after the date of separation, but that results from any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive.” (§ 2102, subd. (a)(2); see § 2105, subd. (d)(3).) “This written disclosure ‘shall be made in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business, or other potential income-producing opportunity, and for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity.’ (Fam. Code, § 2102, subd. (a)(2).)” (*Lappe v. Superior Court*, *supra*, 232 Cal.App.4th at p. 781.)

“The mandatory declaration of disclosure requirements are subject to a few narrow statutory exemptions. . . . [O]n specified conditions, the parties may stipulate to a mutual waiver of the final declaration requirement. (Fam. Code, § 2105, subd. (d).) Unless the mandatory conditions specified in section 2105 are met, no purported waiver is effective to excuse exchange of the prescribed final declarations.” (*Lappe v. Superior Court*, *supra*, 232 Cal.App.4th at pp. 781-782, fn. omitted.) Here, Nguyen and Tran mutually waived the final declaration requirements of section 2105, subdivision (a). In so doing, however, each was required to represent that each had disclosed “all material facts and information regarding the characterization of all assets and liabilities, the

valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.” (§ 2105, subd. (d)(3).) Tran and Nguyen were further required to represent they each understood “this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled” and “noncompliance with those obligations will result in the court setting aside the judgment.” (§ 2105, subd. (d)(5).)

II.

AVAILABILITY OF POSTJUDGMENT REMEDY FOR FAILURE TO FULLY DISCLOSE ASSETS IN DISSOLUTION PROCEEDINGS IS CONTINGENT ON SHOWING OF A MISCARRIAGE OF JUSTICE.

“There are, of course, postjudgment remedies for breach of the fiduciary duty of full disclosure during dissolution proceedings. Within the first six months after entry of judgment, the court has discretion to set aside a judgment under Code of Civil Procedure section 473, subdivision (b) on the grounds of ‘mistake, inadvertence, surprise, or excusable neglect.’ (See *In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138) Historically, ‘[c]ourts have also been held to have inherent power to set aside a judgment, even after the six-month period of Code of Civil Procedure section 473 has passed, if the parties have been deprived of the opportunity to litigate their claim.’ (*Id.* at p. 139.)” (*In re Marriage of Georgiou & Leslie* (2013) 218 Cal.App.4th 561, 570.)

“Further, ‘[i]n 1993, a chapter entitled Relief From Judgment was added to the Family Code. (§§ 2120-2129, added by Stats. 1993, ch. 219, § 108, pp. 1615-1617.) . . . In adopting this chapter, the Legislature found “[t]he law governing the circumstances under which a judgment can be set aside, after the time for relief under Section 473 of the Code of Civil Procedure has passed, has been the subject of considerable confusion which has led to increased litigation and unpredictable and

inconsistent decisions at the trial and appellate levels.” (§ 2120, subd. (d).) [Citation.]” (*In re Marriage of Georgiou & Leslie, supra*, 218 Cal.App.4th at p. 570.)

“Section 2120, subdivision (a), acknowledges that California’s strong public policy of ensuring the fair division of community property can only be implemented with full disclosure of community property. Section 2120 also provides: ‘(b) It occasionally happens that the division of property . . . , whether made as a result of agreement or trial, is inequitable when made due to the nondisclosure or other misconduct of one of the parties. [¶] (c) The public policy of *assuring finality of judgments* must be balanced against the public interest in *ensuring proper division of marital property*, . . . and in deterring misconduct.’ (Italics added.) Section 2120 et seq. apply to dissolution judgments adjudicating support or division of property entered on or after January 1, 1993, and as to such judgments all prior law on ‘equitable’ set-aside relief is preempted. [Citations.]” (*In re Marriage of Georgiou & Leslie, supra*, 218 Cal.App.4th at pp. 570-571.)

““Section 2122 sets out the *exclusive grounds and time limits* for an action or motion to set aside a marital dissolution judgment.’ [Citation.] ‘Unlike traditional equitable set-aside law where “laches” is the only time limit on relief . . . , [section] 2120 et seq. accommodates the public policy interest in putting an end to litigation and ensuring the “finality” of family law judgments by setting *absolute deadlines* on obtaining a post-[judgment] set-aside. Once the statutorily-prescribed period expires ([§ 2122]), set-aside relief is *not available* and the judgment is effectively *final for all purposes*.’” (*In re Marriage of Georgiou & Leslie, supra*, 218 Cal.App.4th at p. 571.)

“Under section 2122, there are six grounds to set aside a judgment, or portion thereof, including actual fraud, perjury, duress, mental incapacity, mistake, and the failure to fully disclose the value of assets under section 2100 et seq. [Citation.]” (*In re Marriage of Georgiou & Leslie, supra*, 218 Cal.App.4th at p. 571.) “An action or motion based on failure to comply with the disclosure requirements *shall* be brought

within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply.” (§ 2122, subd. (f), italics added.)

In order to prevail on a motion to set aside a judgment under section 2122, the moving party must establish that the mistake caused by his or her spouse’s nondisclosure of an asset “materially affected the original outcome and that the moving party would materially benefit from the granting of the relief.” (§ 2121, subd. (b); see *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 684; Code Civ. Proc., § 475.)

III.

THE TRIAL COURT ERRED BY FINDING TRAN FAILED TO DISCLOSE HIS CALPERS PENSION ACCOUNT, ORDERING THE ISSUANCE OF A QDRO DIVISION OF THAT ACCOUNT, AND AWARDING NGUYEN SANCTIONS AGAINST TRAN.

In his petition for dissolution, Tran disclosed he had a retirement account at his “place of employment” and that it had a value of \$49,000. A pension account is a retirement account. “A pension is a ‘retirement benefit paid regularly (normally, monthly), with the amount of such based generally on length of employment and amount of wages or salary of petitioner.’” (*In re Wilbur* (9th Cir. 1997) 126 F.3d 1218, 1220, quoting Black’s Law Dictionary (6th ed. 1990) page 1134.) There is no question Tran had one and only one retirement account and that retirement account, which took the form of a pension, was disclosed at the outset of the dissolution proceedings. Furthermore, there is no dispute that account had a reported present value of \$49,000 at the time the petition was filed.

In the record, the pension account is occasionally and inaccurately referred to as a 401(k) account. Tran explained that he turned over all relevant documents regarding assets, including his then current CalPERS account statement to Paralegal Self-Help Services that assisted Tran and Nguyen in initiating the dissolution proceedings and preparing the documents to be filed. The existence of the retirement plan was disclosed to Nguyen from the beginning. The marital settlement agreement that was

incorporated into the final judgment of dissolution did not refer to the retirement account as a 401(k) account, but, instead, generally referred to the division of Tran's "benefits arising under the retirement plan."

Tran's declaration and Dang's declaration show that before the judgment of dissolution was entered, during a conversation on March 25, 2002, Tran and Nguyen discussed the pension account and the options available to them to divide it between them. Tran and Dang each authenticated a document as Tran and Nguyen's handwritten final agreement, signed by each, in which they agreed Tran's "Public Retirement System account (PERS)" would be divided by cashing out Nguyen's community property interest in that account through Tran paying Nguyen half of its value of \$50,000 in two years.

Nguyen did not object to Tran's evidence or deny the authenticity of the March 25, 2002 handwritten agreement or of their prejudgment conversation about the division of the CalPERS pension account.

On this record, even if we were to assume Tran did not sufficiently disclose, in the petition for dissolution and related documents, that his retirement account was a CalPERS pension account, the record contains undisputed evidence that before judgment was entered in July 2002, Nguyen should have discovered the existence of that account. Therefore, under section 2122, subdivision (f), Nguyen had to bring her motion to set aside the judgment within one year of the date she discovered or should have discovered Tran's failure to comply with the statutory disclosure requirements. Nguyen brought her motion over 10 years after judgment was entered. Thus, Nguyen's motion was not timely.

A cash-out payment of her interest in the CalPERS pension account is permissible and Nguyen does not contend otherwise. (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 518-519 ["[E]ven though pension rights are nonvested or unmatured at separation, they are property that is subject to division and . . . that the trial court may achieve that division either by cashing out the nonemployee spouse through reduction of

the rights to present value”]; see *Phillipson v. Board of Administration* (1970) 3 Cal.3d 32, 46 [“As we noted previously, the court in *Crossan [v.] Crossan [(1939)]* 35 Cal.App.2d 39, 40, awarded all pension rights to the employee and gave community property of equal value to his wife. All parties agree, and we concur, that if the community musters sufficient assets to do so, the preferable mode of division would be to award the pension rights to the employee and property of equal value to the spouse.”]; but see *In re Marriage of Brown* (1976) 15 Cal.3d 838, 848, fn. 10 [“Our suggestion in *Phillipson [v.] Board of Administration, supra*, 3 Cal.3d 32, 46, that when feasible the trial court should award the employee all pension rights and compensate his spouse with other property of equal value, was not intended to tie the hands of the trial court.”].)

Nguyen received the cash-out payment negotiated by her and Tran in the marital settlement agreement and she does not contend otherwise. To the extent she argues that the present value of the CalPERS pension account at the time of division should have been calculated differently, her argument is time-barred. She was aware of, or reasonably should have been aware of, the existence and character of the pension account before judgment was entered. The present value of the account, utilized by Nguyen and Tran in negotiating the marital settlement agreement, was supported by the CalPERS statements provided by CalPERS to Tran. Nguyen had the opportunity to challenge that calculation by filing a motion to set aside the judgment under Code of Civil Procedure section 473, subdivision (b), on the grounds of “mistake, inadvertence, surprise, or excusable neglect” within six months after entry of the judgment of dissolution. (Code Civ. Proc., § 473, subd. (b); see *In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.) She did not do so.

In any event, Nguyen has failed to explain how she was prejudiced by the manner in which Tran disclosed his retirement account. Nguyen’s declaration authenticated a report by her actuary, who, she asserted, valued her community interest in the pension account as now \$623,250. A copy of the report is attached to the declaration.

That report appears to reflect a present valuation of Tran's pension, after he continued to work for the City of Long Beach since 2001. It does not reflect any calculation or opinion of what Nguyen's *present* value share of the pension account was at the time of separation. The trial court's order requiring a division of Tran's CalPERS pension account, pursuant to a QDRO, and sanctioning Tran for violation of the statutory disclosure requirements was issued in error.

DISPOSITION

The order is reversed. Appellant shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.